

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

STEPHEN JAY CALAWAY,
Petitioner.

No. 2 CA-CR 2016-0182-PR
Filed July 29, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20055080
The Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Stephen Jay Calaway, Florence
In Propria Persona

STATE v. CALAWAY
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Stephen Calaway seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Calaway has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Calaway was convicted of aggravated assault of a minor under fifteen, aggravated assault with a deadly weapon, two counts of kidnapping, armed robbery, aggravated robbery, and unlawful use of a means of transportation. The trial court sentenced him to a combination of concurrent and consecutive, enhanced, presumptive sentences totaling 44.5 years’ imprisonment. This court affirmed his convictions and sentences on appeal. *State v. Calaway*, No. 2 CA-CR 2007-0328 (Ariz. App. Jan. 6, 2009) (mem. decision).

¶3 In August 2015, Calaway filed a notice of post-conviction relief, asserting that his indictment was “multiplicious” and violated the double jeopardy clause of the United States and Arizona constitutions and that the trial court erred in imposing consecutive sentences. Appointed counsel filed a notice stating he was “unable to find a meritorious issue of law or fact” to raise in a Rule 32 proceeding. In a supplemental pro se petition, Calaway again raised his double jeopardy and sentencing claims, as well as a claim that he had received ineffective assistance of counsel based on counsels’ failures to raise those claims. The court summarily denied relief.

STATE v. CALAWAY
Decision of the Court

¶4 On review, Calaway repeats his claims, characterizing them as “sub-argument(s) in support of his main claim, of illegal consecutive sentence(s).” He contends the trial court abused its discretion in determining his claims are precluded because they “must be considered” under *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002), and based on federal law relating to procedural default.

¶5 As this court explained in *State v. Lopez*, in an untimely post-conviction proceeding like this one, a claim not falling within Rule 32.1(d) through (h) is barred irrespective of whether a defendant has knowingly, voluntarily, and intelligently waived it. 234 Ariz. 513, ¶¶ 6–8, 323 P.3d 1164, 1166 (App. 2014). Because Calaway’s notice is patently untimely, *Stewart* does not apply. Neither Calaway’s sentencing claim nor his claims of ineffective assistance of counsel fall within Rule 32.1(d) through (h), rather they arise under Rule 32.1(a) and (c). See *State v. Petty*, 225 Ariz. 369, ¶ 11, 238 P.3d 637, 641 (App. 2010). Thus, Calaway’s claims are barred by Rule 32.4(a).

¶6 Additionally, federal habeas law regarding circumstances that might excuse a prisoner’s procedural default in state court has no relevance to a state court’s determination that a Rule 32 petitioner is barred or precluded, under applicable state law, from raising a claim in an untimely, successive petition. Cf. *Martinez v. Ryan*, ___ U.S. ___, ___, 132 S. Ct. 1309, 1316 (2012); *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 5-6, 307 P.3d 1013, 1014 (App. 2013) (Supreme Court’s decision affording “equitable” cause for relief from state court procedural default of federal habeas claim did not alter established Arizona law of claims allowable under Rule 32).

¶7 For these reasons, although we grant the petition for review, we deny relief.